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Supreme Court, U.S.
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SEP 29 1987
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In The
Supreme Court of the United States

No. 87-370

October Term 1987

GORDON H. FAULKNER, CLOID SHULER, NORMAN HUNT, NORMAN G. OWENS, HAN CHUL CHOI, M.D.,

Petitioners,

v.

LAVARITA D. MERIWETHER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Seventh Circuit correctly decided that an inmate who presents a serious medical need is entitled constitutionally to medical treatment from corrections authorities.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	iii
Jurisdictional Statement	1
Opinions Below	1
Constitutional Provisions Involved	2
Statement of the Case	2
Argument	4
A. The Seventh Circuit's Decision that Respondent is Constitutionally Entitled to Medical Care Correctly Applies this Court's Precedents and is not in Conflict with the Decision of any Other Circuit	4
B. The Petitioner Erroneously Characterizes the Seventh Circuit Decision as Requiring Estrogen Therapy When It Expressly Holds Otherwise	7
Conclusion	9

TABLE OF AUTHORITIES

	Page
Cases	
Conley v. Gibson, 355 U.S. 41 (1957).....	4
Cooper v. Pate, 378 U.S. 546 (1964).....	4
Estelle v. Gamble, 429 U.S. 97 (1976).....	passim
Lamb v. Maschner, 633 F. Supp. 351 (D. Kan. 1986).....	9
Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981).....	5
Supre v. Ricketts, 792 F.2d 958 (10th Cir. 1986).....	7
West v. Keve, 571 F.2d 158 (3d Cir. 1978).....	5
Constitutional Provisions	
United States Constitution, Amendment VIII.....	5
Statutes	
28 U.S.C. § 1254.....	2
42 U.S.C. § 1983.....	2

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit (Pet. App. A1-A17) is reported at 821 F.2d 408. The decision of the United States District Court for the Southern District of Indiana (Pet. App. A18-A30) is unreported.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Seventh Circuit issued on June 4, 1987. The petition for a writ of certiorari was timely filed on August 31, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Amendment VIII, provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

Respondent, an inmate in the custody of the Indiana Department of Corrections, brought this action under 42 U.S.C. §1983 complaining of the denial of medical care and the conditions of her confinement.[1/] The district court granted the defendants' motion to dismiss the complaint for failure to state a claim. Respondent appealed to the United States Court of Appeals for the Seventh Circuit which reversed and remanded.

Respondent, a transsexual, suffers from "gender dysphoria," a medically recognized psychiatric disorder characterized primarily by a persistent wish to be rid of one's genitals and live as the other sex. Respondent has been chemically castrated due to nine years of medically supervised estrogen therapy, and has undergone surgical modification of her facial structure, breasts, and hips to enhance a female appearance. (Pet. App. A2-3). Respondent

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1/ Respondent considers herself a female, and will be referred to herein in the feminine gender, as she was in the opinion of the Seventh Circuit. See Pet. App. A1, n.1

wears makeup, female attire, and has feminine mannerisms, and in fact has lived as a female since the age of fourteen, i.e. for nearly fifteen years. (Pet. App. A2-3).

Since her incarceration, Respondent has been provided no medical treatment for the physical or psychiatric aspects of her medical condition. (Pet. App. A3). Petitioner Dr. Choi has made humiliating jokes about Respondent's requests for medication and has indicated that he would ensure that she never received medication. (Pet. App. A3, A48). As a result of Petitioners' failure to continue Respondent's therapy, Respondent has suffered severe withdrawal symptoms. (Pet. App. A3). Petitioners have also failed to provide medical treatment to Respondent for complications arising from her silicone implants. Id.

In addition, Respondent has been segregated in protective custody for periods of up to five and one-half months, where she has been the victim of attempted and completed acts of violence and sexual assault, as she was while maintained in the general inmate population. (Pet. App. A3-4). Respondent has been forced repeatedly to disrobe to reveal her naked body to officers and other inmates for no apparent security or penological purpose. (Pet. App. A4, A48-49).

The Seventh Circuit reversed as to the dismissal of the claim of denial of all medical treatment. The Seventh Circuit concluded that Respondent had stated a valid claim under the Eighth Amendment, which, if proven, would

entitle her to some kind of medical treatment. (Pet. App. A8). The Court of Appeals also remanded Meriwether's "conditions of confinement" claims for consideration by the District Court in the first instance. (Pet. App. A10-17).

ARGUMENT

A. The Seventh Circuit's Decision that Respondent is Constitutionally Entitled to Medical Care Correctly Applies this Court's Precedents and is not in Conflict with the Decision of any Other Circuit.

In remanding the case to the district court, the Seventh Circuit avoided deciding what particular course of medical treatment Respondent, or any other transsexual inmate, is entitled to receive. The court merely decided that Meriwether's allegations, taken as true, state a claim of an unconstitutional denial of medical treatment for a serious medical condition within the definition of this Court's holding in Estelle v. Gamble, 429 U.S. 97 (1976). Because its decision correctly applies this Court's precedents and is not in conflict with any other circuit review by this Court is not warranted.

Petitioners concede that the Seventh Circuit applied the correct Conley v. Gibson, 355 U.S. 41, 45-46 (1957) standard to its review of the lower court's dismissal. (Pet. 5). Respondent's allegations, taken as true, as they must be for the purposes of such a motion, Cooper v. Pate, 378 U.S. 546 (1964), support a grant of relief under Estelle, supra.

Estelle established the now well-recognized standard: "[D]eliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain . . . proscribed by the Eighth Amendment." This Court held that the Eighth Amendment was violated whether the indifference was manifested by prison doctors in their response to the prisoner's needs, or by prison guards in intentionally denying or delaying access to medical care. 429 U.S. at 104. To avoid creating a constitutional violation out of simple malpractice, this Court made clear that the "deliberate indifference" standard was not met by inadvertent failure to provide adequate medical care, or by merely negligent diagnosis or treatment of a medical condition. Id. at 105-6.

The Seventh Circuit's application of the Estelle standard is entirely consistent with that of the Tenth and other circuits. Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980), cert. denied 450 U.S. 1041 (1981) (following West v. Keve, 571 F.2d 158, 161 (3d Cir. 1978)), construes the Estelle standard as creating a two-pronged test. First, the inmate must establish a serious medical need; second, the inmate must present facts amounting to deliberate indifference. A "serious medical need" requires that an inmate's condition, whether physical or psychiatric, "has been diagnosed by a physician as mandating treatment or . . . is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." 639 F.2d 559, 574-5.

The "deliberate indifference" is established where the prison prevents an inmate from receiving the recommended medical treatment or where an inmate is denied access to adequate evaluation for his or her medical needs. Ramos v. Lamm, 639 F.2d at 575.

The decision below tracks the Ramos v. Lamm two-prong approach. The Seventh Circuit concluded that under the first prong of the Estelle test a serious and medically recognized psychiatric disorder such as gender dysphoria may present a "serious medical need". In so doing, it relied on highly regarded medical literature as well as on other courts' recognition of transsexualism as a "very complex medical and psychological problem." (Pet. App. A6-7). The court also noted that Respondent's complaint specified the physicians who had been treating her for the condition of gender dysphoria, before her incarceration. (Pet. App. A8 citing [Pet. App. A47]).

Having identified the serious medical need, the Seventh Circuit then found sufficient allegations of deliberate indifference to that need. Petitioners' failure to provide any treatment at all for the physical or psychiatric manifestations of Respondent's illness clearly meets the second prong of the Estelle test. (Pet. App. A8-9). Respondent's allegations as to the ridicule by Dr. Choi manifest much more than indifference, especially in light of the complete medical substantiation of her pre-existing illness and a prior course of treatment. Petitioners'

response, which was, at best, to ignore the need, and, at worst, to exploit it, does not fall into Estelle's protected areas of inadvertent or negligent failure to provide adequate care.

B. The Petitioner Erroneously Characterizes the Seventh Circuit Decision as Requiring Estrogen Therapy When It Expressly Holds Otherwise.

Petitioners erroneously assert that Meriwether's allegations "establish only a claim that Meriwether is being denied estrogen treatment" and that the "Seventh Circuit's decision that this is sufficient to state a claim" contradicts the decision of Supre v. Ricketts, 792 F.2d 958 (10th Cir. 1986). (Pet. 4-5). On the contrary, the Seventh Circuit does not state that Meriwether is entitled to estrogen, or any particular course of treatment. The court explicitly held otherwise:

> We therefore conclude that plaintiff states a valid claim under the Eighth Amendment which, if proven, would entitle her to some kind of medical treatment. It is important to emphasize, however, that she does not have a right to any particular type of treatment, such as estrogen therapy. . . . (Pet. App. A8) (emphasis added).

After discussing Supre, the court repeated, "While we can and will not prescribe any overall plan of treatment, the plaintiff has stated a claim under the Eighth Amendment entitling her to some kind of medical care." (Pet. App. A9).

Petitioners persist in misreading the decision when they state that it conflicts with Supre. The Seventh Circuit specifically discussed Supre and believed the decisions to be in accord. See Pet. App. A9.

In Supre, the Corrections Department evaluated the transsexual plaintiff's medical claim and, in the exercise of medical judgment, decided against estrogen therapy. Instead, the medical staff recommended testosterone therapy accompanied by mental health therapy. 792 F.2d at 960.[2/] Thus, the Tenth Circuit viewed the facts as falling within the area that Estelle specifically foreclosed from Eighth Amendment relief: the exercise of professional judgment by prison doctors in opting for one particular course of medical treatment over another, as opposed to "a total failure to give medical attention." Supre, 792 F.2d at 963. Explicit is the Tenth Circuit's recognition that a total failure of medical attention, as is present in the instant case, would state a claim for relief under Estelle.

Nor does Lamb v. Maschner, 633 F. Supp. 351 (D. Kan. 1986) conflict with the Seventh Circuit's holding as urged by Petitioners. There, the court on a motion for

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2/ Supre was "deemed closed" on the merits without judicial resolution because the plaintiff was released from custody. The central issue was whether she had "prevailed" within the meaning of 42 U.S.C. §1988 so as to be entitled to attorneys' fees. The court's examination of the substance of the underlying cause of action was simply a predicate to its resolution of the attorneys' fees question.

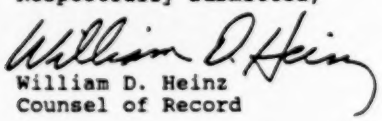
summary judgment faced the question whether the "defendants would be required to provide [a transsexual] plaintiff with the requested pre-operative hormone treatment and surgery." Lamb v. Maschner, supra at 353. As in Supre, the defendants were providing medical treatment, although not the plaintiff's desired form. The court interpreted Estelle to bar a finding of an Eighth Amendment violation. 633 F. Supp. at 353. Nothing in either Supre or Lamb even remotely suggests that Meriwether -- where the inmate alleges a total denial of medical treatment -- was wrongly decided.

Conclusion

Only Petitioners' misreading of the Seventh Circuit's decision leads them to find it in conflict with the Tenth Circuit's Supre decision and with Lamb. These decisions are in accord, and reflect faithful application of Estelle to allegations of deliberate indifference to inmates' serious medical needs.

The petition for a writ of certiorari should be denied.

Respectfully submitted,



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